88-729

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1988

ROBERT ROWE, ET. AL.,
Petitioners,
v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN, ET. AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DONALD J. MARES
LAW OFFICES OF
MCKENDREE, TOLL & MARES
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

JOHN W. MCKENDREE, GENERAL COUNSEL
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION
P.O. Box 2812
Denver, Colorado 80201
(303) 987-2229

(Counsel for Petitioners)

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the lower court erred in refusing to find that Allied and Armco unlawfully unilaterally amended the Plan in effect between Allied and the Oil, Chemical and Atomic Workers International Union and its Local No. 3-523 ("OCAW").

II. Whether it was arbitrary, capricious, in bad faith, erroneous as a matter of law, or unsupported by substantial evidence for the Trustees to conclude that a "lay-off" required employees to suffer a period of unemployment.

III. Whether the district court and the court of appeals should have given *de novo* review in this matter as opposed to utilizing the "arbitrary and capricious" standard of review.

IV. Whether the Respondents violated 29 U.S.C. § 1058 by failing to transfer assets sufficient to fund certain employees' early retirement benefits.

V. Whether the Trustees owed a fiduciary duty to the Social Security Petitioners and whether that duty was breached.

VI. Whether certain Petitioners had standing to sue for breach of a fiduciary duty.

PARTIES TO THE PROCEEDING

The Petitioners in this proceeding comprise of the same group of plaintiffs/appellants in the courts below. The Petitioners consist of the following individuals and entities:
Oil, Chemical and Atomic Workers International Union, AFL-CIO, Oil, Chemical and Atomic Workers Local Union 3-523, Dan Abrams, Jr., Fred L. Archey, Clarence Arrowood, Donald Ball, Robert L. Beloat, Charles W. Campbell, Earl Castle, Kenneth R. Coburn, Ted Cordle, Robert E. Damron, Charles C. Diamond, Eugene S. Duncan, Lancan J. Everman, Bob O. Foster, James C. Fuller, Jr., Glenn Edward Gilbert, L.R. Greene, Charles E. Howard, Joseph M. Ketchesin, James H. Leake, Stanley Lee Leake, Charles J. Phillips, Robert L. Phillips, Wade F. Rigsby, Jack C. Roark, Carl T. Robinson, Robert Rowe, A.W. Snoddy, Elmer Thompson, Jack C. VanHoose, Nelson E. Walker, Bobby Gene Watts, Charles F. Wechsler, Allen J. Conley, William Simmons, John L. Barber, Ishmael R. Brewer, Charles E. Church, Claude Dennison, John D. Griswold, James A. Hayes, Charles Norman King, James C. Kretzer, Everett Lemaster, Jr., Kenneth E. Leibee, Mitchell McCalvin, Paul C. Preston, Paul B. Price, Ersel Salyers, Byron Steele, Jr., Robert L. Thornbury, George E. Walton, Jr., Clifford Brickey, Clifford Eaton, Gene Gabbard, Jesse Hill, John C. Hite, Everett Kiser, George Lester, Herman McKenzie, Donald Richardson, Carl Stapleton, Chester Watson, Jethroe Bowling, Hank C. Conley, Herman Conley, Ralph Fain, Robert L. Garlock, Allen Hogue, Jr., Willy Hughes, Estill V. Martin, Hubert Neace, Floyd M. Penix, James L. Porter, James O. Potter, Curtis E. Puckett, Sheridan E. Sprague, James E. Stambaugh, Earl Wheeler, James N. Yates.

The Respondents are the Allied Chemical Hourly Employees' Pension Plan, Allied Corporation, Armco Inc. Pension Agreement Plan and Armco Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-12a) is unreported since it was not recommended for full-text publication pursuant to Sixth Circuit Rule 24. Neither of the District Courts' Memoranda Opinion and Order are reported, although each is contained in the separate appendix to this Petition at pages 13a and 31a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 22, 1988. No petitions for rehearing were filed in this matter. Further, no orders granting extensions of time within which to petition for certiorari have been entered by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This action generally involves the Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001, *et. seq.* Specifically the following sections of ERISA and other statues relied upon are set out verbatim as follows:

29 U.S.C. § 185:

Suits by and against labor organizations

(a) Venue, amount and citizenship

Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 1002(7):

Definitions

. . .

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1058:

Mergers and Consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multi employer plan to which subchapter III of this chapter applies.

29 U.S.C. § 1104:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d) (3) of this title), the diversification requirement of paragraph (1) (C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1) (B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d) (4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to

be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1132:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

STATEMENT OF THE CASE

Until December 31, 1981, Allied Chemical Company ("Allied") owned and operated a coke-producing facility in Ashland, Kentucky. The hourly employees at the facility were represented by the OCAW pursuant to successive collective bargaining agreements between Allied and the OCAW. Pension benefits for Allied's employees, including the individual Petitioners, at the facility, were governed by the Allied Plan, which was a collectively bargained agreement whose terms were negotiated by OCAW and Allied separately from the collective bargaining agreement. Pursuant to a Letter Agreement of May 12, 1981, the Allied Plan went into effect on that date and had an expiration date of October 21, 1986. The Plan, itself, and the Letter Agreement implementing the Plan provide that benefits specified under the Plan may not be changed or terminated without the agreement of the OCAW.

In general, three provisions of the plan are involved in this appeal. The Allied Plan contains an "80-point" provision in Article IV(2) (a), which permits early retirement when the sum of an employee's age and length of service with Allied is 80 or more. The Plan also contains a provision describing the computation of credited service with Allied for the purpose of determining 80-point pension eligibility for employees who are laid off. This provision reads, in part:

> If an employee is laid off for any reason within three years of the date that he would be eligible to retire under Article IV(2) (a) hereof, he will receive credit for the period of layoff from the effective date up to the date his age and years of credited service, including such period of layoff, equals [sic] 80.

Article IX(4) (a).

The Allied Plan also includes a Social Security "leveling provision," which is available to employees who retire before becoming eligible for Social Security. In essence, Article VII provides that an employee may elect to receive larger monthly payments if he retires before becoming eligible to receive Social

Security, in lieu of the retirement income otherwise payable upon early retirement. Such larger monthly payments will be paid until the day he becomes eligible to receive Social Security payments, after which time his monthly payments will be reduced by the amount of the Social Security benefit.

This case involves the OCAW members' entitlement to various benefits following the sale of Allied's Ashland Coke Plant to Armco, Inc. (''Armco'') and a transfer of certain pension assets from the Allied Plan to the Armco Pension Plan in accordance with a sales agreement entered into between Allied and Armco with an effective date of December 31, 1981. Although OCAW met with Allied representatives on several occasions during the month preceding the sale date, the OCAW never agreed to any changes to the Allied Plan. In fact, the sale raised tensions between the OCAW and the various parties to the sale, including a new character in the sale, the United Steelworkers of America, which union, in effect, unlawfully ''took over'' representation of the OCAW members after the sale. The recent denial of a separate Petition for Writ of Certiorari filed by, among others, the Steelworkers left standing a decision of the Sixth Circuit Court of Appeals that the OCAW continued to be the exclusive bargaining agent of those employees of the sold coke plant after the sale date.

The Petitioners in this action have been, throughout the litigation, categorized into three groups. Group 1 Petitioners consist of those individuals who were within three years of reaching eligibility for an 80-point pension at the time of the sale and who accepted employment with Armco. Each Group 1 Petitioner applied for an Allied 80-point pension under Article IX(4) (a) of the Allied Plan. Allied denied the pension application of each Group 1 Petitioner.

Group 2 Petitioners consist of those individuals eligible for 80-point retirement on or before the date of the sale but who accepted employment with Armco without, as of the time of the sale, retiring from Allied. On or about December 1, 1984, each Group 2 Petitioner applied for an 80-point pension under the terms of Article IV(2) (a) of the Allied Plan and each was denied

their pension applications in January of 1985.

Petitioners who retired from Allied on or before the sale date, foregoing employment with Armco, and receiving the aforementioned Social Security option, consist of Group 3 Petitioners. The OCAW was also a Plaintiff below and is also a Petitioner herein.

Counts I and III of the Complaint apply to Groups 1 and 2, respectively. Both counts represent claims brought under § 1132 of ERISA, 29 U.S.C. § 1132, for wrongful denial of benefits under the Allied Plan. Each count also alleges that the failure of the Allied Plan and Allied, itself, as Plan Administrator, to pay such benefits constitutes a breach of fiduciary duties in violation of 29 U.S.C. § 1104.

Counts II and IV asserts statutory violations of ERISA pursuant to 29 U.S.C. § 1058. Count II alleges that by failing to transfer assets to the Armco Plan sufficient to pay Group 1 80-point pensions, Allied and its Plan violated the referenced section and their fiduciary duties, as well. Count IV alleges that the transfer resulted in a diminution of the benefits to which Group 1 and 2 Petitioners were entitled in violation of § 1058.

Count V alleges that Allied and/or its Plan wrongfully induced Group 3 Petitioners to retire and that the same constituted willful or negligent representation in violation of the Allied Plan, fiduciary duties of § 1104 and, common law duties. Count VA alleges that the failure of Armco to inform Allied or the Group 3 Petitioners of their intention to furnish the Social Security option constituted willful or negligent misrepresentation and that such conduct was a breach of fiduciary duties of the Armco Plan in violation of § 1104.

Count VI is brought under the Labor Management Relations Act, 29 U.S.C. § 185, and alleges that, by violating the provisions of the Allied Plan, Allied breached its collective bargaining agreement with the OCAW.

Federal jurisdiction in the court of first instance is based upon 29 U.S.C. § 1132, 29 U.S.C. § 185(a) and 28 U.S.C. §§ 1332 and 1337.

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ in this matter for several reasons which will be explained in more detail below. The Court of Appeals entered an Opinion which is in conflict with the decisions of other Federal Courts of Appeal. Further, the lower court Opinion departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court so as to warrant an exercise of this Court's power of supervision.

I. THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE ALLIED RESPONDENTS UNILATERALLY AMENDED THE ALLIED PLAN, RESULTING IN A BREACH OF THE COLLECTIVE BARGAINING AGREEMENT AND OF THEIR FIDUCIARY DUTIES.

By affirming the decision of the District Court to deny the 80-point pension to the Group 1 and 2 Petitioners, the Court of Appeals, in essence, sanctioned unlawful activity to the serious detriment of the Petitioners. Group 1 and Group 2 Petitioners applied to Allied for the retirement due each such Petitioner under the 80-point pension program. The Group 1 Petitioners suffered a layoff when they ceased working for Allied resulting in their qualification for the 80-point pension given their years of service and age at that time. The Group 2 Plaintiffs were eligible for the 80-point pension at the time of the sale transaction. It was, therefore, unlawful for Allied to reject their applications for this benefit.

The provisions of the Plan provide the Group 1 and 2 employees with an unconditional right to retire from Allied with an immediate 80-point pension, even if they accept employment with another employer. Nevertheless, Allied gave the Group 2 Petitioners at the time of the sale a choice between an immediate pension from Allied or employment from Armco.

This characterization by Allied of the choices to the Group 2 Petitioners acted as an amendment to the Allied Plan in violation of both the collective bargaining agreement and the

fiduciary duties of the Administrator of the Plan, Allied Chemical. As mentioned above, the collective bargaining agreement and pension document unequivocally provide that the OCAW must agree to any modification of the Plan. The actions taken by Allied in its sales transaction, a separate and exclusive arrangement from the relationship between the OCAW and Allied, which modify the Group 1 and Group 2 Petitioners' rights under the Allied Plan, result in a breach of that agreement.

At the time of the sale each Group 1 Petitioner was within three years of his age and service credit being equal to 80. The Group 2 Petitioners had the unconditional right to retire from Allied even before the sale. Whatever private agreement Allied entered into with Armco concerning the rights of the Allied Plan participants may have been enforceable between Allied and Armco but clearly is unenforceable as to the OCAW and its members given the provision requiring the OCAW's agreement with any changes and the requirement that any changes be ratified.

The OCAW's constitution requires ratification of agreements before any agreement comes into being. Thus, in *Lear Siegler v. International Union, U.A.A. and A.I.W.*, 419 F.2d 534, 535 (6th Cir. 1969), the Sixth Circuit Court of Appeals, itself, held that:

> [a] negotiating team, unless given the power to bind its principal, usually reports the proposed agreement to the union membership which may ratify or reject the pact. The method of ratification, unless otherwise stipulated by the parties, is an internal concern of the union. . . . Until it ratifies the agreement and executes the final instrument *the contract does not become operative.*

Citations omitted, emphasis added.

The question of whether to accept amendments to the Allied Plan was never presented to or ratified by the employees of Local 3-523 of the OCAW. Thus, no agreement to amend the Allied Plan written or otherwise, could modify the Group 1 and

2 Petitioners' pension rights. Allied's actions in entering into an agreement with a third party to the collective bargaining agreement and pension plan to modify the rights of participants results in a breach of fiduciary duty by Allied pursuant to 29 U.S.C. § 1104. Further, such actions resulted in a breach of the collective bargaining agreement by Allied pursuant to 29 U.S.C. § 185(a). Nonetheless, the Court of Appeals in its decision below accepted that Allied and Armco could amend the plan. The lower courts affirmed the theory that the Group 2 Petitioners were faced with a choice to either retire or accept employment with Armco, but not both.

The Court of Appeals' decision departs greatly from the accepted and usual course of proceedings warranting this Court's reviewing this matter. Otherwise, parties to a collective bargaining agreement, particularly labor organizations, will never feel confident that their binding agreement with the employer, who happens to be the administrator of a trust fund, will not be cast aside at the whim of the employer/administrator to the betterment of the employer in its transaction. This policy cannot be allowed to stand as it disrupts any confidence labor organizations, in particular, feel in having a collective bargaining agreement setting forth single employer pension plans.

II. THE LOWER COURT'S DECISION THAT THE EMPLOYEES DID NOT SUFFER A LAYOFF, AS THE TERM IS UTILIZED IN THE PLAN, IS BOTH IN CONFLICT WITH OTHER COURTS OF APPEALS DECISIONS AND IMPROPERLY ADDS TERMS TO THE AGREEMENT TO THE DETRIMENT OF THE PARTICIPANTS.

Even though the employees of Allied ceased working for Allied on the day before the sale and began working for a wholly separate employer after the sale, at different wage rates and representation by a different labor organization, the United Steelworkers, the lower court found arbitrarily that, merely because the employees suffered no break in service, the layoff provision in the Allied Plan was not triggered. This decision

conflicts with well reasoned authority from other Federal Courts of Appeals facing substantially similar situations and also goes well beyond the accepted and usual course of judicial decision making.

That the Group 1 Petitioners suffered no period of actual unemployment following their separation from Allied employment is simply immaterial. Article IX(4) (a) of the Allied Plan credits Allied employees laid off within three years of attaining an 80-point pension with remaining service necessary for a pension. A separation from Allied employment "for any reason" triggers the right to accrual of layoff pension under said Article. The only precondition in the Plan triggering continuation of an Allied Pension credit under Article IX(4) (a) upon separation from Allied employment is interruption of Allied Pension credits. However, this interruption is in no way dependant upon any period of unemployment. The Group 1 and Group 2 Petitioners suffered a break in Allied Pension credit, and according to the clear language of the Plan, were laid off within the meaning of Article IX(4) (a) of the Allied Plan, even though they were immediately hired by Armco.

The lower court characterized the interpretation of the term "lay off" as a reasonable interpretation not arbitrary or capricious. Since the decision violates clear language of the Plan, the administrator's decision should have been overturned without an analysis of whether that decision was arbitrary or capricious. The case law relied upon by the lower court in determining that the interpretation of the term lay off requires some period of unemployment is inapplicable. In both *Jung v. F.M.C. Corp.*, 755 F.2d 708 (9th Cir. 1985) and *Pabst Brewing Co. v. Anger*, 610 F.Supp. 214 (D. Minn. 1985), *aff'd.* 784 F.2d 338 (8th Cir. 1986), each court was interpreting the termination language in connection with whether employees were eligible for severance benefits. Not only do the two cases relied upon by the lower courts not involve language even remotely similar to the language presented herein concerning layoff in a 80-point pension early retirement setting, but the considerations involved in whether to pay severance benefits are separate and distinct from

the situation before the Court. Indeed, the decisions relied upon by the Sixth Circuit expressly find that severance benefits are payable to help during a period of unemployment, thus bolstering the requirement that there be a period of unemployment. No such consideration is involved in whether an employee receives 80-point pension.

The Plan contains no requirement that there be any period of unemployment. Indeed, both the lower court and the Respondents acknowledged this fact when each suggests that the Group 2 Petitioners should have retired while working for Allied and then filed an application with Armco for employment. The employee following this suggestion could receive the pension and suffer no break in severence. The arbitrariness of such a distinction is obvious. It is arbitrary to state that two employees should be treated differently when one retired the day before the sale and applied with Armco to start the day after the sale when the other would be denied his early retirement merely because he did not fill out the application. In any event, according to the Plan, itself, the triggering event is not the filing of the application for benefits, but the layoff. Both employees who had to suffer a layoff, should be treated similarly and receive benefits.

The Sixth Circuit's decision is in conflict with other circuits which hold that it is arbitrary and capricious to require a period of unemployment before benefits can be paid. The Sixth Circuit's decision conflicts with *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985) and *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (8th Cir. 1985).

The Petitioners urge this Court to grant the Writ of Certiorari in this matter in order to resolve the conflict created by the Sixth Circuit. The Writ is also properly granted since the Sixth Circuit's decision, in its arbitrariness and unreasonableness, calls for this Court's review.

III. THE STANDARD OF REVIEW FACED BY PETITIONERS BELOW WAS IMPROPERLY DEFINED AND IN CONFLICT WITH DECISIONS OF OTHER FEDERAL

COURTS OF APPEALS REQUIRING DE NOVO REVIEW WHEN A PLAN ADMINISTRATOR HAS FINANCIAL INTEREST IN THE OUTCOME OF A DECISION.

Unquestionably Allied Chemical, the Plan Administrator of the Allied Plan, had a great financial interest in the outcome of its transaction to sell the Coke Plant in Ashland, Kentucky to Armco. The disposition of issues surrounding the pension plan could have been a stumbling block if a resolution was not reached between the parties to that transaction. Notwithstanding that any amendments to the plan should have been agreed to and ratified by the OCAW and it's Local's membership, Allied completed its transaction and transferred funds out of the Allied Plan without a formal amendment to the Plan.

Where a plan administrator has a financial interest in the outcome of the transaction or interpretation or construction of a plan, further review and interpretation of the plan is subject to *de novo* review by the district court and by the appellate court. *Haeffele v. Hercules Inc.*, 839 F.2d 952 (3rd Cir. 1988); *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985). The Sixth Circuit's decision to utilize only the arbitrary and capricious standard of review, which gives great defference to the plan administrator, is in conflict with these decisions of other courts of appeals. The Court should grant the Writ to resolve this conflict.

The lower court used a narrow arbitrary and capricious standard, in any event. The standard of pure "arbitrary and capricious" has been held by the Sixth Circuit to apply to decisions involving the denial of benefits. *See Addcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623 (6th Cir. 1987). However, the Sixth Circuit, itself, has recognized that a broader standard can be utilized depending on the circumstances of the case. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985). In *Blakeman* the Court found the correct standard of review to be whether a decision was arbitrary, capricious, in bad faith, erroneous as a matter of law, or unsupported by substantial evidence. *Ibid.* at 1149. Thus, where the Sixth Circuit utilizes

only the arbitrary and capricious standard to instances where the administrators rendered a decision erroneous as a matter of law or unsupported by evidence, the Sixth Circuit defied its own precedent by not overturning the plan administrator's decision.

Whether the Allied Respondents breached their fiduciary duties under 29 U.S.C. § 1104 and whether the Allied Respondents' conduct in failing to transfer sufficient assets to the Armco Plan, as discussed below, constituted further statutory violations under ERISA are issues separate and apart from the benefit denial standard utilized by the lower court. Granting the Writ of Certiorari will allow this Court to correct this serious deviation from the accepted and usual course of judicial proceedings and reason.

In fact, even the Trustees of the Allied Plan do not have final authority to interpret pension eligibility under the Plan, itself. Under Article XII of the Allied Plan if a pension applicant disputes an interpretation concerning his eligibility, the dispute is subject to final and binding arbitration by a neutral third party subject to the interpretation of *de novo* review. The Allied Respondents have repudiated their obligation to arbitrate disputes concerning pension eligibility concerning the Group 1 and 2 Petitioners. The lower court, therefore, ignored this clear language in the Plan leaving, once again, a decision dangerous to individuals dealing with pension plans.

IV. SINCE THE GROUP 1 AND 2 PETITIONERS' 80-POINT PENSIONS ARE NONFORFEITABLE ACCRUED BENEFITS PROTECTED UNDER ERISA, THE ALLIED RESPONDENTS VIOLATED 29 U.S.C. § 1058 BY FAILING TO TRANSFER SUFFICIENT ASSETS TO THE ARMCO PLAN.

Decisions from several circuit courts hold that funded, unreduced, early retirement benefits such as the Group 1 and Group 2 Petitioners' 80-point pensions are nonforfeitable accrued benefits protected under ERISA. *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2nd Cir. 1985); *Hoover v. Cumberland, Maryland Teamsters Pension Fund*,

756 F.2d 977 (3rd Cir. 1985); *Shaw v. International Association of M. & A.W. Pension Plan*, 750 F.2d 1458 (9th Cir. 1985). Indeed, because each Group 1 and 2 Petitioners' 80-point pension would survive pre-retirement termination of employment, each such pension was a vested nonforfeitable right. *See Nachman v. Pension Benefit Guarantee Corp.*, 446 U.S. 359 (1980).

The Court of Appeals below committed a gross oversight in the facts of this case when it concluded that the Group 2 Petitioners were entitled to an 80-point pension under the Armco Plan and would receive the same benefits as they would have received if they had remained at Allied. In fact, under Article XIV of the Allied Plan, the Group 2 Petitioners had an indefeasible right to an immediate 80-point pension before the Allied Respondents in essence, amended the plan to alter the employees' benefits. The condition that Group 2 Petitioners forfeit the immediate Allied 80-point pensions to obtain alleged "guaranteed" Armco employment is void. What in fact occurred is that Armco credited Group 2 Petitioners under the Armco Plan with their Allied years of service allowing the Group 2 Petitioners to commence benefits only upon retiring from Armco employment. In essence, therefore, the circumstance faced by the Group 2 employees with Armco was radically different from their immediate right to the 80-point pension before the sale. Thus, the lower courts committed blatant factual oversights which must be rectified.

The Group 1 Petitioners were, as discussed above, laid off within three years of being eligible for an 80-point pension. The Plan, therefore, dictated that each such employee had an nonforfeitable right to an 80-point pension once his years of credited service with Allied (already sufficient) and his age equaled 80. This right was vested and nonforfeitable.

Given that the Group 1 and Group 2 Petitioners held vested, nonforfeitable rights, the lower court committed serious error in not determining that the Allied Respondents violated 29 U.S.C. § 1058 by carrying out a transaction which resulted in a reduction of benefits to these individuals. Given the dearth of

decisions interpreting § 1058, it is appropriate that this Court exercise its power of review to analyze the application of this section of ERISA.

V. ASSUMING THE GROUP 3 PETITIONERS' SOCIAL SECURITY OPTIONS ARE NOT NONFORFEITABLE ACCRUED BENEFITS PROTECTED UNDER ERISA, THE LOWER COURT ERRED IN FINDING THAT THE ALLIED RESPONDENTS DID NOT OWE THE GROUP 3 PETITIONERS FIDUCIARY DUTIES UNDER ERISA, WHICH DUTIES THEY BREACHED, AND IN FINDING THAT ARMCO IMPROPERLY AMENDED THE TERMS OF THE PLAN.

Assuming *arguendo*, that the Allied Respondents owed the Group 3 Petitioners no duty to maintain their Social Security options under the Allied Plan, the Allied Respondents continue to owe the Group 3 Petitioners other fiduciary duties, among them, the duty to advise accurately regarding the right to a Social Security option under the Armco Plan after the sale. Such being the case, the lower court erred when it concluded that the Allied Respondents owed the Group 3 Petitioners no fiduciary duties under ERISA.

Even though the Group 3 Petitioners did, in fact, exercise their option to receive the retirement income, these individuals continue to have a dispute with Allied. The Group 3 Petitioners claim that the Allied Respondents induced these employees to retire from Allied and forego Armco employment by misrepresenting to them that their Social Security options would not be available if they accepted Armco employment. The Allied Respondents violated 29 U.S.C. § 1104 by, among other things, failing to heed the prohibition against amending the Group 3 employees' rights without OCAW's agreement. In essence, the Group 3 Petitioners never should have been faced with that choice inasmuch as the OCAW never agreed to the amendment to the Plan. The lower court, therefore, committed error departing greatly from accepted judicial proceedings warranting this Court's review.

VI. THIS COURT SHOULD REVIEW THE LOWER COURTS DECISION TO STRIP THE GROUP 3 PETITONERS AND THE OCAW OF THEIR RIGHT TO CHALLENGE ARMCO'S ACTION.

The Group 3 Petitioners properly can be viewed as participants with respect to the Armco Plan. The plain language of 29 U.S.C. § 1002(7), defining a "participant," includes members or former members of an employee organization. Here, Armco agreed to preserve the Group 3 Petitioners' options by contract and accepted assets from Allied for that purpose. In this case, before and at the time of the sale, the Group 3 Petitioners were members of the OCAW, an employee organization, and they were eligible to receive benefits under the Armco Plan. Thus, Armco's actions resulted in its failure to ensure that those employees knew they had rights under the Armco Plan.

Since Armco accepted benefit liabilities for the Group 3 Petitioners and assets from Allied for these individuals, the Sixth Circuit does have subject matter jurisdiction over Armco's actions and should not have dismissed the Group 3 Petitioners' action against Armco for breach of its fiduciary duty to them.

The OCAW was also wrongfully dismissed in this action warranting review of the Sixth Circuit's decision in part on a theory which has not been addressed by this Court and which warrants the granting of the Writ. The District Court ruled that the six month statute of limitations set forth in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), was applicable to the OCAW's case pursuant to 29 U.S.C. § 185(a). It was improper for the Sixth Circuit to utilize the *DelCostello* duty of fair representation/§ 185 hybrid statute of limitations action to the instant action brought by the OCAW and other Petitioners against Allied. Petitioners "breach of the collective bargaining agreements" claim is not a hybrid duty of fair representation action. The OCAW, itself, claims to be an injured party and is suing on behalf of its members for breach of contract. Thus, the action would be better governed by a five-year statute of limitations and not the six year hybrid statute applicable in *DelCostello*. This Court has not had occasion to

address a circumstance similar to that presented herein where a non-hybrid action pursuant to § 185 is brought by a labor organization. Therefore, it would be appropriate for the Court to grant the Writ to resolve this important dispute as to whether the OCAW is, in fact, barred from bringing the action.

CONCLUSION

The Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted:

LAW OFFICES OF
McKENDREE, TOLL & MARES

By: _____
Donald J. Mares
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

Of Counsel

John W. McKendree, General Counsel
O.C.A.W.I.U.
P.O. Box 2812
Denver, Colorado 80201
(303) 987-2229

(Attorneys for Petitioners)